

A **Goh Keah Hock v**
Mahkamah Perusahaan, Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R2-
25-19 OF 2000

B FAIZA TAMBY CHIK J
19 JULY 2001

C *Administrative Law* — Remedies — Certiorari — Industrial Court award — Whether Industrial Court erred in law — Failure to take into account relevant considerations — Taking into account irrelevant considerations — Failure to take into account applicant's written submission — Whether High Court should interfere with decision of Industrial Court

Labour Law — Industrial Court — Jurisdiction — Finding of facts — Whether High Court should interfere — Whether Industrial Court's ultimate decision was correct

D This was the applicant's application for an order of certiorari to quash the award of the Industrial Court on the grounds that the Industrial Court had: (a) erred in law by not taking into account relevant considerations and by taking into account irrelevant consideration, namely, the applicant's fight with another co-worker; and (b) acted unreasonably by failing to take into account the evidence tendered therein and failing to consider the applicant's written submission. **E** Before the Industrial Court, the issue for consideration was whether the applicant had been dismissed with just cause and excuse. The company pleaded various grounds to support the dismissal and at the conclusion of the hearing, the Industrial Court found that the termination was with just cause and excuse. **F**

Held, dismissing the application:

- G** (1) The applicant had not shown what was the irrelevant consideration that the Industrial Court had considered. Both parties had led evidence before the Industrial Court, and the Industrial Court had heard and decided the case on the evidence and the pleaded issues. The applicant had not at any time during the proceedings objected to the issues raised and the evidence led and his counsel had cross examined the evidence on all the issues. Further, the applicant's grounds for judicial review were not on jurisdictional facts but on the matters of finding of facts. Therefore, the grounds did not fall under the purview of judicial review. Certiorari should not be used as a disguise to appeal from findings of facts. Once there was evidence to support a finding of fact, the reviewing court would not interfere with it (see p 42C-E). **H**
- I** (2) It was also trite that it was not the reviewing court's function to interfere on the sufficiency of evidence. The conclusion of finding

- was purely left to the Industrial Court and the reviewing court would not interfere merely because the latter might come to different conclusions (see p 43F–G). **A**
- (3) The Industrial Court did not decide in favour of the company purely on the issue of fighting. Independently of the issue of fighting, the Industrial Court found in favour of the company on other grounds. The fight was in issue because it supported the company's contention that the applicant had the motive to act and behave in the way that he did. On evidence, the Industrial Court found that the applicant became insubordinate to his superior, refused to carry out his duties and instigated his co-workers to leave the company. Therefore, even though the Industrial Court's decision was partly based on the issue of fighting, that alone did not make its whole decision perverse. The Industrial Court found in favour of the company independently on other grounds, which justified the applicant's dismissal. Further, the deliberation on the issue of fighting by the Industrial Court did not amount to a miscarriage of justice. Its ultimate decision was still correct (see pp 44A, D–F, 48C). **B**
- (4) The applicant did not plead, either in this application or in the affidavit in support, that there was breach of natural justice. Although the company's letters of warning to the applicant did not specifically state in detail the applicant's insubordination, the applicant knew the reasons for the issue of the warning letters. The applicant was given the second warning letter one month before his dismissal. As such, the applicant had many opportunities before and after the letters of warning to ask why he was warned but the applicant did not do so. All these pointed to his knowledge. Although the applicant denied knowing what the insubordination was about, the Industrial Court did not believe him and made a finding in favour of the company. The Industrial Court's finding of facts was based on evidence and was therefore not perverse (see pp 45B–D). **C**
- (5) There was no factual support for the applicant to say that the Industrial Court did not consider his written submission. The company did not file its written submission because the Industrial Court had handed down its decision before the time for the company to file its reply had expired. The non filing of a replying affidavit cannot be a ground for allowing the judicial review. In Industrial Court matters, there were rules and practice on giving evidence and record of evidence. Affidavits were not called for and all evidence adduced was recorded in the notes of evidence (see pp 45H–I, 46B, 47C); *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 not followed. **D**
- (6) If a replying affidavit were necessary, then the presiding chairman of the Industrial Court must affirm and file the replying affidavit. The affidavit, in order to amount to a satisfactory rebuttal, must **E**
- F**
- G**
- H**
- I**

- A be affirmed by the person who had personal knowledge of the facts in issue. In cases where the exercise of the discretion by a public decisionmaker was challenged, the rebuttal must come from the decision-maker. The company should not be penalized for the Industrial Court's failure to file a replying affidavit. In any event, the contentions in the applicant's affidavit can be countered by way of submission and not by replying affidavit (see p 47D–G).
- B

[Bahasa Malaysia summary]

- C Ini adalah permohonan pemohon untuk satu perintah certiorari bagi membatalkan award Mahkamah Perusahaan atas alasan bahawa Mahkamah Perusahaan telah: (a) tersalah pertimbangan di sisi undang-undang dengan tidak mengambilkira pertimbangan-pertimbangan yang relevan, dan mengambilkira pertimbangan-pertimbangan yang tidak relevan iaitu, pergaduhan pemohon dengan seorang pekerja lain; dan (b) bertindak secara tidak wajar dengan gagal untuk mengambilkira keterangan yang telah diberi dan gagal untuk mempertimbangkan hujahan bertulis pemohon. Di hadapan Mahkamah Perusahaan, isu untuk dipertimbangkan adalah sama ada pemohon telah dipecat dengan alasan dan sebab yang adil. Syarikat tersebut memplid pelbagai alasan bagi menyokong pemecatan tersebut dan pada kesimpulan perbicaraan, Mahkamah Perusahaan memutuskan bahawa penamatan tersebut adalah dengan alasan yang adil dan saksama.
- D
- E

Diputuskan, menolak permohonan tersebut:

- F
- G (1) Pemohon telah tidak menunjukkan apakah pertimbangan tidak relevan yang telah dipertimbangkan oleh Mahkamah Perusahaan. Kedua-dua pihak telah mengemukakan keterangan di hadapan Mahkamah Perusahaan, dan Mahkamah Perusahaan telah mendengar dan memutuskan kes tersebut atas keterangan dan isu-isu yang diplid. Pemohon telah tidak pada bila-bila masa ketika prosiding itu membantah kepada isu-isu yang dibangkitkan dan keterangan yang dikemukakan dan peguam telah memeriksa balas keterangan ke atas semua isu. Selanjutnya, alasan-alasan pemohon untuk kajian semula kehakiman bukannya atas fakta-fakta budi bicara tetapi atas perkara-pekerja pendapat fakta. Oleh itu, alasan-alasan tersebut tidak terlingkung di bawah lingkungan kajian kehakiman. Certiorari tidak seharusnya digunakan sebagai samaran untuk merayu daripada keputusan fakta-fakta. Apabila adanya keterangan untuk menyokong sesuatu keputusan fakta, mahkamah yang mengkaji semula tidak akan mencampurinya (lihat ms 42C–E).
- H
- I (2) Adalah mantap bahawa bukan merupakan fungsi mahkamah kajian semula untuk mencampuri dalam hal kecukupan

keterangan. Kesimpulan pendapat adalah terpulang semata-mata kepada Mahkamah Perusahaan dan mahkamah kajian semula tidak akan mencampuri semata-mata kerana pihak yang terkemudian mungkin akan mencapai kesimpulan yang berasingan (lihat ms 43F–G).

- (3) Mahkamah Perusahaan tidak membuat keputusan semata-mata atas isu pergaduhan. Tanpa mengambilkira isu pergaduhan tersebut, Mahkamah Perusahaan telah membuat keputusan yang memihak kepada syarikat tersebut atas alasan-alasan yang lain. Pergaduhan tersebut telah dijadikan isu kerana ia menyokong penegasan syarikat tersebut bahawa pemohon mempunyai motif untuk bertindak dan berkelakuan seperti mana yang telah dilakukan. Menurut keterangan, Mahkamah Perusahaan mendapati bahawa pemohon menentang pegawai atasannya, enggan untyuk menjalankan tugas-tugasnya dan menghasut pekerja-pekerja bersamanya untuk berhenti atau meninggalkan syarikat tersebut. Oleh itu, meskipun keputusan Mahkamah Perusahaan adalah sebahagiannya berdasarkan ke atas isu pergaduhan tersebut, itu sahaja tidak menjadikan keseluruhan keputusannya salah. Mahkamah Perusahaan telah membuat keputusan yang memihak kepada syarikat tersebut bebas daripada alasan lain, yang mewajarkan pemecatan pemohon tersebut. Selanjutnya, perdebatan atas isu pergaduhan tersebut oleh Mahkamah Perusahaan tidak membawa kepada ketidakadilan. Keputusannya yang muktamad masih betul (lihat ms 44A, D–F, 48C).

- (4) Pemohon tidak memplid, sama ada dalam permohonan ini atau di dalam affidavit sokongan, bahawa terdapatnya keingkaran keadilan asasi. Walaupun surat amaran syarikat tersebut kepada pemohon tidak menyebut dengan khususnya sifat keingkaran pemohon terhadap pegawai atasannya, pemohon mengetahui sebab-sebab bagi pengeluaran surat amaran tersebut. Pemohon telah diberikan surat amaran kedua satu bulan sebelum pemecatan beliau. Oleh yang demikian, pemohon mempunyai peluang yang banyak sebelum dan sesudah surat-surat amaran tersebut untuk menanyakan mengapa beliau telah diberi amaran tetapi pemohon tidak melakukan yang sedemikian. Semua perkara ini menunjukkan pengetahuan beliau. Meskipun pemohon menafikan mengetahui apakah keingkaran pemohon terhadap pegawai atasannya itu, Mahkamah Perusahaan enggan mempercayai beliau dan telah membuat keputusan yang memihak kepada syarikat tersebut. Keputusan fakta oleh Mahkamah Perusahaan adalah berdasarkan keterangan dan adalah dengan itu tidak salah (lihat ms 45B–D).

- (5) Tidak terdapat sokongan faktual bagi pemohon menyatakan bahawa Mahkamah Perusahaan telah tidak mempertimbangkan penghujahan bertulis beliau. Syarikat tersebut telah tidak memfailkan penghujahan bertulisnya kerana Mahkamah

- A** Perusahaan telah menyampaikan keputusannya sebelum masa untuk syarikat tersebut memfailkan jawapannya luput. Tindakan tidak memfailkan satu affidavit jawapan tidak boleh dijadikan alasan untuk membenarkan kajian semula kehakiman. Dalam perkara-perkara Mahkamah Perusahaan, terdapatnya kaedah-kaedah dan amalan memberikan keterangan dan rekod keterangan. Affidavit-affidavit telah tidak diminta untuk dikemukakan dan semua keterangan yang diberikan telah dicatatkan dalam nota-nota keterangan (lihat ms 45H-I, 46B, 47C); *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 tidakikut.
- B**
- C** (6) Sekiranya satu affidavit jawapan adalah perlu, maka pengerusi yang bertindak untuk Mahkamah Perusahaan mesti mengesah dan memfailkan affidavit jawapan tersebut. Affidavit tersebut, untuk menjadi satu pematihan yang memuaskan, mestilah disahkan oleh seseorang yang mempunyai pengetahuan peribadi tentang fakta-fakta yang dipersoalkan. Di dalam kes-kes di mana penggunaan budi bicara oleh seorang pembuat keputusan awam telah dicabar, pematihan tersebut mestilah datang daripada pembuat keputusan tersebut. Syarikat tersebut tidak sepatutnya dihukum kerana kegagalan Mahkamah Perusahaan untuk memfailkan satu affidavit jawapn. Dalam apa keadaanpun, pertikaian-pertikaian di dalam affidavit pemohon boleh dipatahkan melalui penghujahan dan bukan melalui affidavit jawapan (lihat ms 47D-G).]
- D**
- E**

Notes

- F** For cases on certiorari generally, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 135-306.
For cases on jurisdiction of the Industrial Court, see 8(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1248-1298.

G Cases referred to

Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin [1997] 2 MLJ 17 (refd)

Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia [1995] 3 MLJ 369 (refd)

- H** *Kewal Krishnan v Minister for Local Bodies & Ors* AIR 1959 J & K 17 (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (not folld)

Yamamori (HK) Ltd v Davidson & Ors [1992] 2 MLJ 410 (refd)

I

Harjinder Singh (Pereira Ng & Din) for the applicant.
Saw Lip Khai (Ooi Lee & Co) for the respondent.

Faiza Tamby Chik J: The issue for determination before the Industrial Court was whether the applicant had been dismissed with just cause and excuse. The company pleaded various grounds to support the dismissal. Those grounds, and the evidence led by both parties, were considered by the Industrial Court. At the conclusion of the hearing, the Industrial Court found that the termination was with just cause and excuse. Before this court, the applicant is now seeking judicial review to quash the Industrial Court's award and decision on four grounds.

Industrial Court had erred in law by not taking into account relevant considerations and by taking into account irrelevant considerations

I am of the view that the applicant has not shown what was the irrelevant consideration that he said the Industrial Court had considered. It is observed that both parties in the hearing before the Industrial Court had led evidence according to what had been pleaded. The Industrial Court had heard and decided the case on the evidence and the pleaded issues (see p 9 of the Award). The applicant had not at any time during the proceedings objected those issues raised and the evidence led. In fact, the applicant's counsel had cross examined the evidence on all the issues. Further, the applicant's grounds for judicial review are not on jurisdictional facts but on the matters of finding of facts. Therefore, the grounds do not fall under the purview of judicial review. It has been repeatedly held and said that certiorari should not be used by way of a disguised appeal from findings of facts. The reviewing court will not interfere with the trial court's finding of facts unless they are completely unsupported by any evidence. And once there is evidence to support a finding of fact, the reviewing court will not interfere with it. Since the law is trite, it is sufficient for me to cite Prof MP Jain in his book *Administrative Law of Malaysia and Singapore* (3rd Ed) at pp 714-717:

The courts have emphasized time and again that certiorari should not be used by way of a disguised appeal from findings of fact. The courts have thus laid down the norm that they would not interfere with the findings of fact by a body unless the same are completely unsupported by any evidence. This is known as the 'no-evidence' rule. A finding having no evidence to support it is characterized as a 'perverse' finding of fact; it is regarded as an error of law and is quashed. If, however, there is some evidence to support a finding of fact, the courts do not interfere with it. The courts do not regard it as their function to interfere with the findings of fact by a body merely because of insufficiency or inadequacy of evidence.

The courts have evolved such a restrictive rule to review facts as they want to give the tribunals enough leeway to decide cases entrusted to them for disposal. Too much interference with them may take away the advantages, and the rational, of tribunal adjudication. But, at the same time, these bodies cannot be left completely uncontrolled lest they should act in an arbitrary manner. Therefore, the 'no-evidence' rule has been evolved to impose a limited judicial review on facts decided by them.

If there is some evidence to support a finding of fact, it is not then for the courts to go into the sufficiency or adequacy of the evidence. It is not the court's function to review, reassess, reappraise, or draw

- A** its own inferences as to facts from the evidence. The court will not interfere merely because it may come to different conclusions on facts on the basis of the same evidence. The court has to take the evidence as it stands and not go into the question of its reliability in a petition for certiorari. A finding based solely on conjecture, surmise or suspicion is a finding based on no evidence. Such a finding can be quashed by the court. If there is some evidence to support a finding, then the court would not quash the finding on the ground that the evidence was insufficient. But when there is absolutely no evidence on record to support a finding, then the court will interfere. Whether a finding is based on legal evidence or not is itself a question of law.
- B**

...

- C** As regards findings of fact by the Industrial Court, the Federal Court observed in *Non-Metallic Mineral Products Manufacturing Employees Union v South East Asia Fire Bricks Sdn Bhd*:

‘That tribunal was charged with findings of fact, and unless it can be shown that the evidence was so much one way that no reasonable tribunal could have disregarded it, it is not possible to interfere with its finding of fact.’

- D** Again, rejecting an application for certiorari against a decision of the Industrial Court, the Supreme Court observed in *Harpers*:

‘It is surely not a case where the Industrial Court had acted on no evidence or had come to a conclusion which on the evidence, it could not reasonably come to.’

- E** Weighing and assessing the evidence of the witnesses is the function of the Industrial Court and not that of the High Court.

It has already been stated earlier that technical rules of evidence do not apply to adjudicatory bodies which can accept evidence of some probative value. The reliability and admissibility of evidence are matters to be decided by the decision-maker. In case a finding of fact is based on evidence of no probative value, it may be quashed as perverse through certiorari by the review court.

- F**
- It is also trite that it is not the reviewing court’s function to interfere on the insufficiency of evidence. The reviewing court would not review, reassess, reappraise, reappraise evidence or draw its own inferences as to facts from the evidence. The conclusion of finding is purely left to the Industrial Court and the reviewing court will not interfere merely because the latter may come to different conclusions. If ever the applicant’s sole objection is that on the issue of fighting, the issue was pleaded by the company in its statement in reply, para 4.1, as a ground for dismissal. Therefore, the issue was relevant. In fact, it is observed that the applicant’s counsel cross examined the witnesses on this issue. If anything more, it were a question of finding facts, of which the reviewing court would not interfere. The incident of fighting was in issue. I think it was to preclude showing the claimant (applicant) who behaved in a way that the company had no choice but to ask him to leave. He became insubordinate to his superior, refused to carry out his duties and follow orders, instigated co-workers to leave the company, etc. I think those grounds for dismissal were substantial and serious in nature. They were pleaded in the statement of reply. Evidence was adduced and witnesses were being cross examined on those grounds.
- G**
- H**
- I** Now, the claimant challenges the Industrial Court’s award that the latter

had taken into account irrelevant consideration, ie the issue of fighting. He wants the whole award to be quashed. But the Industrial Court decided in favour of the company not purely on the issue of fighting. Independently of the issue of fighting, the Industrial Court also found in favour of the company on other grounds. To quote:

... COW-1 had given the claimant two warning letters in February and March 1996, although couched in not specific terms, they do state about the claimant's insubordination.

It was not only COW-1's allegation alone that the claimant had slackened, and/or refused to teach and guide the workers or apprentices, but COW-3, COW-4 and COW-5 in their evidence did state the same thing. These three witnesses confirm that the claimant refused to guide or allocate work to them, after the incident of the fight, and that the operations manager himself had to do the guidance and allocations of their daily work after or during this period. The company's allegations that the claimant was disparaging the company, instigating the workers to leave and look for jobs elsewhere in companies which give better pay, are also confirmed by these various employees who came forth as witnesses (Award No 1, p 8).

The fight was in issue because it supported the company's contention that the claimant had the motive to act and behave in the ways that he had done. He asked his superior, COW-1, to sack the other party to the fight. COW-1 did not do what he wanted, so he became unhappy (notes of evidence, p 125). His former co-employees came to testify. On evidence, the Industrial Court found that not only did he become slackened, he became insubordinate, refused to follow orders and duties, and instigated other employees to leave the company. Therefore, I am of the view that even though the Industrial Court's decision was partly based on the issue of fighting, that alone did not make its whole decision perverse. The Industrial Court found in favour of the company independently on other grounds justifying the company to dismiss him. I am also of the view that the Industrial Court, by deliberating on the issue of fighting, did not amount to a miscarriage of justice. Its ultimate decision is still correct (see *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia* [1995] 3 MLJ 369 at p 394, Federal Court). It must be borne in mind that the Industrial Court had also found in favour of the company on other grounds for his dismissal. The Industrial Court had found on evidence that the applicant had spread rumours demeaning the company (pp 7-8 of the Award), that the applicant had slackened, refused to teach the workers and apprentices (p 8 of the Award), and that the applicant had disparaged the company, instigated the workers to leave and look for jobs elsewhere (p 8 of the Award).

It is observed that there is no specific incident of breach of natural justice pleaded in this application nor in the affidavit in support. The warning letters did not specifically state the reasons of the warning. It had been the company's position in the proceedings that the applicant had been informed, knew or ought to have known the reasons because of the circumstances. This was pleaded in para 6 of the statement in reply filed therein. At p 8 of the Award, the Industrial Court found that to quote: 'The operations manager, COW-1, had given the claimant two warning letters in

- A February and March 1996, although couched in not specific terms, they do state about the claimant's insubordination.' The Industrial Court considered the point in the context of the other evidence as well. It was a finding of facts in totality of evidence and, I think the finding should not be interfered with. The claimant's allegation that he was not given an opportunity to improve himself did not arise in this case. His acts of
- B insubordination, refusal to carry out duties or follow orders, and instigation were acts of deliberation. He did what he had done with motive and purpose. Although the letters of warning to him did not state in detail his insubordination/refusal to follow orders, he knew what they were about. The Industrial Court deliberated on this issue (Award No 1, p 8). He
- C denied knowing what the insubordination was and refusal to carry out orders about. But because those acts were acts of deliberation by themselves, he knew or ought to have known his wrongs. When he was given the second warning letter (exh CLA-11), he even said he was not surprised to receive the warning. He said he knew that it would happen (notes of evidence, p 127). He was given a letter of warning (exh CLA-10) about a
- D month before his dismissal. He had many opportunities before and after the letters of warning, but he did not even bother to ask why he was warned. All those pointed to his knowledge. The Industrial Court did not believe him and made a finding in favour of the company. The Industrial Court's finding of facts was based on evidence. It was not a perverse one. The Industrial Court found that because of the claimant's insubordination and
- E refusal to carry out his duties of guiding and allocating work to the workers, his superior, COW-1, himself had to carry out his duties instead (Award No 1, p 8). Evidence showed that it was the claimant's continual insubordination and refusal to carry out his duties and follow orders that the company had no choice but to ask him to look for another job. I think it was
- F unfortunate that the co-workers left the company, the operation of the company could have been forced to close down. It was the company I think which suffered.

Unreasonableness by failing to take into account the evidence tendered therein and by failing to consider the applicant's written submission

- G The Industrial Court directed the applicant to put his written submission first, on or before 2 December 1999 (p 134 of notes of evidence). However, the applicant had only done that after 15 December 1999 (p 26 of exh GHK-5 to the affidavit of the applicant affirmed on 11 February 2000, annexed to encl 7). Was the Industrial Court being unreasonable to the
- H applicant when sufficient time had been given to him? Further, there is no factual support for the applicant to say that the Industrial Court did not consider his written submission. I think it is mere speculation. If the Industrial Court did consider his written submission, then it would be a cause for objection by the company, not the applicant, because the company's time for putting in its written submission had not expired when the Industrial Court came to its decision. As to why the company did not
- I file its written submission, this is because the Industrial Court had handed down its decision before the time for filing expired. The Industrial Court

directed that the company had three weeks to reply (p 134 of notes of evidence). Even taking the earliest date from 15 December 1999, the company still had until 7 January 2000 to file its written submission. By 3 January 2000, the Industrial Court had already handed down its decision in favour of the company, making it superfluous and redundant for the company to file its reply.

I am of the view that the non-filing of a replying affidavit cannot be a ground for allowing the judicial review. The obiter dicta in *R Rama Chandran's* case shall not be followed for these reasons. Firstly, that part of Edgar Joseph Jr FCJ's judgment in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 is only obiter dicta. He allowed the appeal not because the respondent employer did not file the affidavit in reply. He made it clear in his judgment that he decided upon the evidence as appeared in the record of appeal (see [1997] 1 MLJ 145 at p 231B-C). He said:

... I was satisfied, upon the whole of the evidence appearing in the record of appeal, ... the award ... was flawed on the grounds of *Wednesbury* unreasonableness ...

He even seemed to have reservations about his obiter dicta when he made it a point to state in his judgment that the point of law was not discussed by the dissenting judgment of Wan Yahya FCJ, nor was it counter-submitted by the counsels for the employers, Dr Das and Mr Kathegesu. In the instant case, the contents of the claimant's affidavit in support are the claimant's contentions why the Industrial Court's award should be overturned. They are not evidence. In judicial review of the industrial court's award, like any appeal, no party can adduce further evidence whether orally or by affidavit. All evidence is already contained in the notes of evidence. The function of affidavits are well explained in *Yamamori (HK) Ltd v Davidson & Ors* [1992] 2 MLJ 410 at p 423 the court said:

But the affidavit just quoted in so far as they matter contain only contentions and submissions which are really not the function of an affidavit. The affidavit makes submissions and contentions with regard to the meaning of a judgment and by quoting the judgment in part in the affidavit without even exhibiting the notes of proceedings and the judgment. It would be a pointless exercise for an affidavit in reply which will, given the circumstance, surely merely contain differing submissions and contentions which are best left to counsel to address the court. See *Alfred Dunhill Ltd v Sunoptic SA and Re Application by Dow Jones (Asia) Inc* at p 225. There is no allegation of fact in the said affidavit which if unrefuted would entitle the plaintiff to judgment and consequently there is no such admission by default of an affidavit in reply.

The passage in the book *Judicial Review* by M Supperstone QC and J Goudine QC quoted by Edgar Joseph Jr FCJ, was about the court resolving conflicting affidavit evidence. The cases cited by him, namely *Chief Constable of North Wales Police v Evans* and *Leech v DG of Parkhurst Prison*, were also about resolving conflicting affidavit evidence. They are not on the point whether it was necessary to file a replying affidavit. In the instant case, the evidence was adduced orally and all are contained in the notes of

A evidence. Even if the claimant wanted to tender further evidence, he must ask for leave of court. Again, the Indian cases cited by the judge — namely *Ramarao Laxmikant Shirkhedkar v AG*, *Maharashtra Rowjee v State of AP*, *Pratap Singh v State of Punjab*, *Narayan v State of AP* and *MP Industries v Income Tax Officer Nagpur* — they are not Industrial Court matters. In non-Industrial Court matters, the decisions of which are also subject to judicial review, there is usually no set of rules regulating the calling of evidence. In judicial review of those matters, evidence is usually tendered for the first time in the form of affidavits. Because the evidence came up by way of affidavits for the first time, it is necessary for the other party to contradict the evidence by tendering other evidence, in same form, by way of affidavit in reply. In our Industrial Court matters, there are rules and practices on giving evidence and record of evidence. Affidavit is not called for. All the evidence adduced are recorded in the form of what we call ‘notes of evidence’. Before me are the notes of evidence for review whether the decision or decision making of the Industrial Court is correct, acting upon exactly the materials or evidence the Industrial Court had before it.

D Secondly, if a replying affidavit is necessary, then the presiding chairman of the Industrial Court himself must affirm and file the replying affidavit. In *Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin* [1997] 2 MLJ 17 at p 33, the Court of Appeal said:

E There is another aspect to this principle. It is that the affidavit, in order to amount to a satisfactory rebuttal, must be affirmed by the person who has personal knowledge of the facts in issue. In cases where the exercise of discretion by a public decision-maker is challenged, in the absence of those special circumstances which we referred to a moment ago, the rebuttal must come from the decision-maker himself. An affidavit by a deponent who has no personal knowledge of the considerations upon which the decision was based is pure hearsay and is worthless as evidence and not court can be expected to pay the slightest attention to it.

The second respondent should not be penalized for the failure of the first respondent (the Industrial Court) to file a replying affidavit. I think the contentions in the claimant’s affidavit can be countered by way of submissions and not by replying affidavit.

G As regards the letter produced by COW-3 marked CO-O2, it is noted that COW-3 came to court to testify. He said the contents of the letter CO-A2 were what the claimant told him (notes of evidence, p 44). The contents then become his testimony and evidence in the proceedings. He was also being cross examined by the claimant’s counsel on whether the contents of the letter were what the claimant told him. The Industrial Court found that the claimant did tell COW-3 what appeared in the letter, to quote: ‘There is no reason why the witnesses would testify in that manner if it was not true that the claimant had gone round to ‘run-down’ his own employer’ (Award no 1, p 8, lines 1–2).

I Even if the Industrial Court might have committed an error by going into the issue of fighting, that error may not automatically warrant the whole Award to be quashed. The reviewing court will look at it as if the ultimate

decision was still correct. The Federal Court in *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia* [1995] 3 MLJ 369 at p 394 said: **A**

Suffice to say that in the circumstances of this case, the ultimate decision being correct, no injustice of any sort, whether substantial or inconsequential, has been occasioned because of the alleged wrong reasons.

The Court followed the judgment of Wazir CJ in *Kewal Krishnan v Minister for Local Bodies & Ors* AIR 1959 J & K 17, which held: **B**

Although the reasons given in the order of the Minister may be erroneous yet if the order can be supported by other valid grounds, writ of certiorari to quash that order cannot be granted.

The Industrial Court did not decide in favour of the company just on the issue of fighting. It is clear from the Award that it had found independently on other grounds. In any case, I am of the opinion that the ultimate decision in the Award is correct. The claimant cannot challenge the finding of facts by the Industrial Court nor the merits of its decision. To quote the Federal Court's judgment in *Hoh Kiang Ngan* at p 393: **C**

... an application for the prerogative order of prohibition is not an appeal and neither the High Court nor this court is entitled to review the merits of any decision reached by the Industrial Court. **D**

For these reasons, the application for certiorari and other relief is hereby dismissed with costs. **E**

Application dismissed.

Reported by Lim Lee Na

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